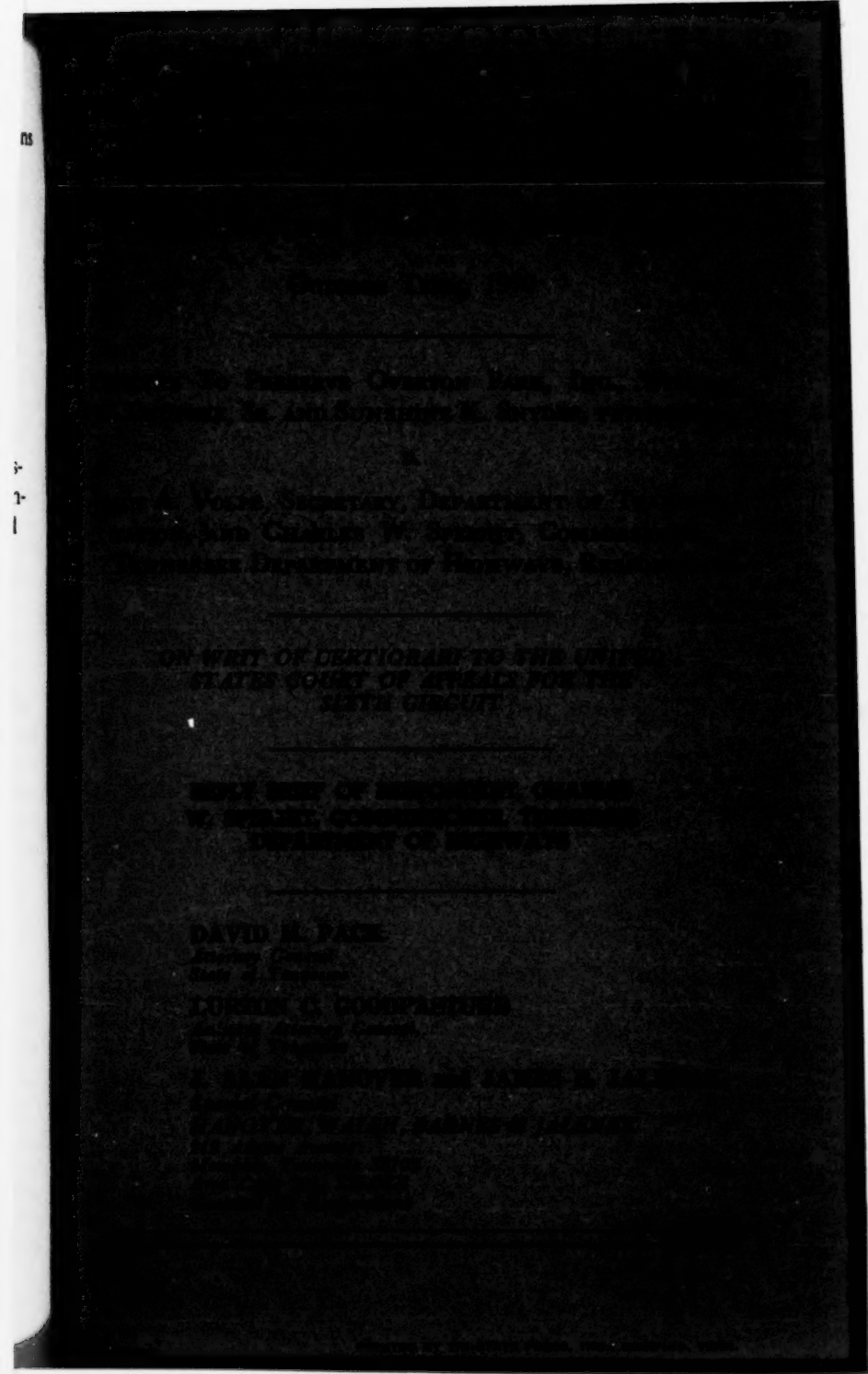

TABLE OF CONTENTS

INDEX TO CITATIONS

CASES

CONSTITUTION, STATUTES, RULES

In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM W. DEUPREE, SR. AND SUNSHINE K. SNYDER, PETITIONERS,

v.

JOHN A. VOLPE, SECRETARY, DEPARTMENT OF TRANSPORTATION, AND CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS, RESPONDENTS.

REPLY BRIEF OF RESPONDENT, CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS

May It Please The Court:

I. STATEMENT OF THE CASE

This case involves the question whether Respondents' motion for summary judgment under rule 56 of the Federal Rules of Civil Procedure was properly granted by the United States District Court for the Western District of Tennessee, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit.

This Court, after granting a stay against Respondents, accepted Petitioners' application for said stay and brief thereon as a petition for certiorari, granted same, and has set this matter for hearing on oral argument on January 11, 1971. In addition to the named parties, the Audubon Society and the Sierra Club joined as plaintiffs below and several interested groups have been permitted to file briefs in this Court as *amicus curiae*, including the city of Memphis, Tennessee, and the Memphis Chamber of Commerce.

Since the granting of the petition for certiorari on December 7, 1970, Respondent Volpe, on December 15, 1970, filed with this Court a motion to remand the cause to the

District Court, which motion has been opposed by this Respondent. As of the time of preparation of this brief, this Court has not acted on this motion. The points raised by the Solicitor General in this motion are taken up in detail in this brief.

This cause originated in the United States District Court for the District of Columbia by the filing by Petitioners of a complaint in December 1969 against Respondent Volpe (hereinafter "Volpe" or the "Secretary"). The action was for a declaratory judgment and injunctive relief sought by certain named individuals and an organization, who alleged violations by Volpe of 23 U.S.C. §128, which are not now an issue,[1] and violations of 23 U.S.C. §138 and 49 U.S.C. §1653(f),[2] all in connection with Volpe's approval of a Federal-Aid highway project, Interstate Highway Number I-40, through a public city-owned park, in the city of Memphis, Tennessee, known as Overton Park. This will be a limited access, expressway-type highway.

The pertinent portions of the complaint, the only material pleadings under Rule 56 of the Rules of Civil Procedure involved in this case, insofar as they pertain to the issues before this court, are as follows:

> "8. On April 19, 1968, the Federal Highway Administrator *preliminarily approved* the proposed location of the Project.
>
> "9. On or about June 4, 1969, the Department of Highways for the State of Tennessee (hereinafter the 'Tennessee Highway Department') requested

[1] This charge dealt with alleged procedural defects in regard to the public informational-type hearings which a state must conduct and certify to the Secretary of Transportation, through which the State considers various social and economic effects when Federal-Aid highway projects are involved. These issues were resolved by both lower courts in favor of the Respondents and have been abandoned by Petitioners in this Court.

[2] These are the statutes dealing with the approval by the Secretary of Transportation of Federal-Aid highway projects which require the use of park lands and similar sites. The statutes, now worded identically, are quoted in full in other portions of this brief.

that the defendant or his subordinates approve a design of the Project which the Tennessee Highway Department submitted to the United States Bureau of Public Roads. On or about November 5, 1969, Defendant Volpe *approved that design* on the condition that the design be modified in accordance with certain requirements which he stipulated. The Tennessee Highway Department has given notice that the design of the Project will be modified according to Defendant Volpe's stipulation.

"10. On or about November 10, 1969, the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the Project. The Tennessee Highway Department has stated that on or about December 19, 1969, it proposes to take bids for construction of parts of the Project, including a part of the Project which will pass through Overton Park." [Emphasis added]

The complaint went on to state the following:

"20. Construction of the Project will require use of a number of acres of park land and recreation area from Overton Park. Overton Park is a park and recreation area of state and local significance. Overton Park has been determined by the state and local officials having jurisdiction thereof to be of state and local significance.

"21. Neither Defendant Volpe nor any previous Secretary of Transportation has made *any finding* that there is no feasible and prudent alternative to the use of such public park and recreation areas. Defendant Volpe has made *no finding* that the program for the Project includes all possible planning to minimize the harm to such park and recreation areas. In the absence of such findings, *his approval of the Project* has violated 23 U.S.C. §138 and 49 U.S.C. §1653(f).

"22. There are feasible alternatives to the use of such park and recreation areas. One or more of the

feasible alternatives are prudent alternatives. The Project does not include all possible planning to minimize harm to such park and recreation areas.

"23. Defendant Volpe plans to treat *his approval of the Project* as a contractual obligation of the Federal Government and to make expenditures to the State of Tennessee pursuant thereto. Because that approval, having been given in violation of 23 U.S.C. §§128, 138, and 49 U.S.C. §1653 (f), is null and void and without legal effect, such expenditures will violate 23 U.S.C. §102." [Emphasis added][3]

Thereafter, the cause was transferred by the United States District Court for the District of Columbia to the District Court for the Western District of Tennessee on the application of Respondent Volpe. The only significant action taken prior to this was a protective order denying Petitioners the right to take the deposition of one Lowell K. Bridwell during the pendency of Respondent Volpe's motion to dismiss. At the same time the cause was transferred to Tennessee, this Respondent was made a party by the Court,[4] apparently under Rule 19 of the Federal Rules of Civil Procedure. This Respondent did not claim sovereign

[3] It is important that the Court note at this point that the only claim made was that Volpe has made "no finding," not that he made a finding that was arbitrary, capricious or an abuse of discretion. Further, there is no claim that any finding was made that was not supported by substantial evidence.

[4] Petitioners also filed an amended complaint making this Respondent a party. The amended complaint contained no changes in the material allegations previously quoted. The original complaint and the amended complaint raised various constitutional issues which have subsequently been waived by Petitioners [see App., p. 163].

immunity under the Eleventh Amendment to the Constitution of the United States.[5]

A large number of affidavits, some with various attachments, plans, photographs and drawings, were filed by all parties both in the District of Columbia and in Tennessee, to which no objections as to competency were raised. Respondent Volpe then moved the Trial Court to treat his motion to dismiss as one for summary judgment, which motion for summary judgment was joined in by this Respondent. After lengthy arguments of counsel, the District Court took the matter under advisement and subsequently rendered a writen opinion reported in 309 F.Supp. 1189, which granted said motions for summary judgment. The district Court also refused to grant a stay to Petitioners pending their appeal to the United States Court of Appeals for the Sixth Circut, although the Court of Appeals did, upon Petitioners' application, grant such a stay pending the disposition of that appeal.

The Court of Appeals, in an as yet unreported opinion,[6] handed down September 29, 1970, affirmed the Trial Court, so that this case is now before this Court on a petition for certiorari, as before explained.

II. THE ISSUES BEFORE THIS COURT

As previously stated, the main issue is the correctness of the Trial Court's granting of Respondents' motions for summary judgment; however, for proper consideration and determination by this Court, this issue must be subdivided into its basic parts.

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[5] Respondent raised no issue of sovereign immunity, but has always contended that the Federal Courts have no authority to enjoin the State from building the highway. With that reservation, the state of Tennessee chose to participate in the case because Respondent has felt since the inception of this controversy (some 15 years) that it had a valuable interest to protect and a duty toward its citizens to provide this much-needed means of rapid transportation to the city of Memphis, the largest metropolitan area in the state.

[6] The full text of this opinion, as well as the dissent of Judge Celebrezze, was supplied to this Court by Petitioners with their original application for a stay.

The Petitioners in their brief filed in support of their original application for a stay[7] listed five basic questions upon which their petition for certiorari is now based. These were stated as follows:

> "(a) Whether the Secretary of Transportation sufficiently complied with 49 U.S.C. §1653(f) and 23 U.S.C. §138 in approving this highway without making any record of a determination that there are no feasible and prudent alternatives to the use of a public park and that the design includes all possible planning to minimize harm to the park?
>
> "(b) Where the Secretary has not made a record of any determination under sections 1653(f) and 138, whether his Court's decision in *United States* v. *Morgan,* 313 U.S. 419 (1941), prohibits interrogation of a former Federal Highway Administrator to ascertain what determinations, if any, were made under those sections and the basis for any determinations?
>
> "(c) Whether the courts below could properly review the Secretary's approval of this highway without reference to the full administrative record on which the Secretary acted, but rather on the basis of affidavits prepared for this litigation?
>
> "(d) Whether the courts below were correct in holding that the petitioners were required to show that the Secretary's approval of this highway was arbitrary and capricious in order to obtain relief?
>
> "(e) Whether the record contains disputed issues

[7] Because of time factors involved, and the distance between counsel, Respondent had a draft of Petitioners' brief only a short period prior to the printing of this brief. Therefore, the format of this brief necessarily follows Petitioners' Application for a Stay (treated by this Court as a Petition for Certiorari) and Brief in support of same. Counsel for Petitioners very cooperatively advised counsel for Respondent of the contents of Petitioners' brief, and the cursory reading of Petitioners' brief allowed before printing deadlines showed this advice accurate and helpful.

of material fact, relevant to a review of the Secretary's actions, which make district court's grant of summary judgment for respondents erroneous?"

A sixth issue, not specifically stated by Petitioners, is a determining precedent to the issues Petitioners have raised, particularly the first four issues stated above. This sixth issue is:

> Does the Administrative Procedure Act, particularly the sections providing for Judicial Review [5 U.S.C. §§701-706] apply to the approval of the Secretary of Transportation of a highway project under 23 U.S.C. §138 and 49 U.S.C. §1653(f)?[8]

These six issues are subdivided further as the discussion in the following argument requires.

III. STATEMENT OF FACTS

Although the facts alone are not controlling in this case, Respondent feels that this Court should have a clear idea of what Overton Park is, what it contains, and its location in order to understand more fully the position of both Respondents and their predecessors in selecting this route and design. Since this Respondent will be unable to review Petitioners' statement of facts presented to the Court prior to the completion of this brief, he can only rely upon previous written and oral statements made by Petitioners to the two lower courts and to this Court. Petitioners have in the past attempted to influence the true meaning of the facts by the use of adjectives and opinions drawn from their deep emotional involvement in conservation. Such statements as "massive project" and "biological barrier," made by Petitioners in their previous briefs, are examples in point. In

[8] Both lower courts, as well as Petitioners, have assumed its application, and arguments have centered around the standard of judicial review required. Respondent respectfully suggests that this Court at the time of the oral arguments presented on the application for a stay on December 7, 1970, appeared to be making this same assumption. Respondent respectfully submits that a detailed examination of this Act, as will be hereinafter set out, will establish that this Act has nothing whatsoever to do with this case.

addition, Petitioners tend to exaggerate beyond the realm of reason, or tell only a part of the story, so that persons unfamiliar with the Park or the plans for the road would think this highway plan completely ignored the interests of conservation. To the contrary, these plans are fully accountable to our national conservation policies, balancing these, as they must be, with other, but equally important, national policies regarding transportation and safety.

In addition, Petitioners have in the past attempted to make it appear that they represent a great number of people, and that the entire citizenry is up in arms against Respondents, while, in actual fact, every elected official, including the Mayor and the thirteen members of the City Conncil,[9] have gone on public record as favoring the completion of Interstate Highway I-40 through the Park under its present design, which they realize does minimum harm to the Park [see affidavit of Henry Loeb, Mayor, City of Memphis, App., p. 126; Resolution of City Council, App., p. 26; Resolution of Memphis Park Commission, App., p. 119; Affidavit of Hal S. Lewis, Executive Director, Memphis Park Commission, App., p. 112]. In addition, many citizens groups, such as the Memphis Chamber of Commerce, representing a large number of local residents, have evidenced their support of the present route to the extent of filing *amicus curiae* briefs in this Court.

The highway project in question is a segment of Interstate Highway Number I-40, part of the National System of Interstate and Defense Highways [see 23 U.S.C. §103(d)]. The particular project encompasses slightly more of that highway than will be in the Park. The highway will be the major east-west expressway through Memphis; those parts to the east and west of the Park are included in other projects which are in the construction stage at the present time [see affidavit of Virgil A Rawlings, Regional

[9] Of the 13 Councilmen, six are elected at large from the City and seven are elected from districts, one of which, of course, includes the Park.

Right-of-Way Engineer, Tennessee Department of Highways, App., p. 128].

Overton Park, (herein sometimes called the "Park"), is an almost rectangular block of land containing approximately 342 acres, located near the center of the city. The zoo in the Park is now separated from the rest of the Park by a fence and bus road [see below], and is entirely outside the Highway right-of-way which was acquired. The zoo has always been separated from the Park, and the public has been allowed to enter only at designated entrances. Only one zoo entrance has ever been provided on the side where I-40 will be. The highway plans call for an attractive pedestrian overpass at that entrance so that visitors to the Park can still visit the zoo in the same manner as before. The zoo has always occupied the northern portion of the total land area. Its natural expansion area was, and still is, to the east, which will not be affected by the road [see affidavit of Hal S. Lewis, App., p. 112; affidavit of Thomas E. Maxson, City Engineer, City of Memphis, App., p. 122; see also Resolution of Memphis Park Commission, App., p. 119].

The rest of the Park, south of the zoo, contains a nine-hole golf course, a large outdoor theatre, an art academy, formal garden, bridle paths, nature trails, playgrounds, picnic areas, and a small lake. The highway will be far from the golf course, the outdoor theatre, the art academy or the formal garden. After construction, there will still be over 320 acres with bridle paths, nature trails, playgrounds, and the like. The lake will remain intact, and although close to the road, it will still keep its attractive setting and will continue to be used and enjoyed in the same manner as before [see affidavits previously referred to]. As an undisputed fact, not a single one of these facilities will be affected

substantially, nor will the public be affected in the slightest in its use and enjoyment of these facilities.[10]

As shown in the aforementioned affidavits, the highway right-of-way follows a presently-existing, nonaccess, diesel bus route, 40 to 50 feet wide, which has bisected the Park for many years, in exactly the same place and in a similar manner as will the new highway. The only difference is that the new highway right-of-way will, of course, be wider;[11] but a large portion of the highway will be depressed below normal grade, whereas the bus route now follows grade level and is, therefore, seen more easily.[12] A large portion of the 26 acres in the right-of-way is already paved with concrete (about 25 feet wide) for this bus route, which follows the zoo fence previously mentioned. Petitioners complain about the "noise and air pollution that accompany major highways" [Petitioners' Court of Appeals brief, p. 3], when, in fact, any noise or pollution produced by these buses is closer to the zoo than the highway will be [see affidavit of Virgil A. Rawlings, App., p. 128]. In addition to the bus route, the Park is bordered on three sides by three of the largest and most heavily-traveled thoroughfares in Mem-

[10] It could be successfully argued that the completion of I-40 with its interchange near the eastern edge of the zoo will make the Park and zoo considerably more accessible to thousands of people who live in outlying suburban areas.

[11] The right-of-way through the Park is basically 250 feet wide, but gradually expands to 450 feet at the eastern edge of the Park because of the interchange previously mentioned. The only facility in this part of the Park is a wooden, open air pavilion, used in conjunction with the picnic grounds. The road will not require its removal, but the state of Tennessee has supplied the City of Memphis Park Commission with the necessary funds to remove it and build another farther south [see attachment to affidavit of Virgil Rawlings, App., p. 128].

[12] This bus route is not separated from the Park or the playground areas by any safety barrier and can be crossed by pedestrians at any point. In contrast, the design of I-40, in accordance with usual practice, calls for a fence to keep persons from walking across traffic. In order to go from the zoo to the Park or vice versa a visitor will not have to cross on the same level with vehicles and will face no traffic danger.

phis. Placement of the highway through the Park was planned, in part, to alleviate traffic, noise, and pollution problems created by these City thoroughfares, being one of the reasons there are no other feasible and prudent routes [see affidavit of William S. Pollard, Jr., partner, Harland Bartholomew and Associates, App., p. 101].

The last-mentioned affidavit by the head of the firm which planned the highway route points out that two of these major streets, which are the northern and southern boundaries of the Park, will serve as service roads and permit easy access to and from I-40. If either of the alternate routes suggested to the Court during the previous oral argument (loops to the north and south) had been approved, it would, in addition to the problems mentioned by Mr. Swick in his affidavit (discussed in detail hereinafter), destroy the basic purposes of the highway, since there would be no major street to feed or carry off traffic. Under the present route selection, I-40 runs practically parallel with these two major streets from one end of town to the other. The Pollard affidavit also shows that in the original planning for the Memphis urban expressway system, the location of I-40 along its present route was a major consideration, so that to change the route now would materially affect the balance of the entire system. This includes its circumferential route and its north-south facility, all of which was planned before the statutes in controversy were enacted and construction of most of which is now completed.

Petitioners do not contest that such an east-west expressway is an absolute neecessity in Memphis[13] [see affi-

[13] It has already been pointed out to the Court that Memphis, with a population of some 700,000 persons, is unique as large cities are concerned. Its western boundary is the Mississippi River and, through the years, it has grown mainly to the east because of low lands to the north, and the state line with the state of Mississippi on the south. The majority of its commercial and industrial development is in the west, while a majority of its residents live in the east. I-40 through Overton Park will be the only direct means for a resident in the east

davit of Henry Loeb, Mayor, App., p. 126, and affidavit of William S. Pollard, Jr., App., p. 101]. On the contrary, it is an undisputed fact that not only is such a route a vital necessity, but also that its delay has already caused great harm to the general public in this area.

The record is undisputed that, of the approximately 170 acres of wooded area in the Park, only about 10 to 15 wooded acres are in the proposed right-of-way.[14] As stated, the bus route presently uses a large portion of the right-of-way, and there are two small gravel parking lots which will have to be relocated. This parking is the only improvement in the right-of-way that will be taken. The Park Commission has made arrangements already to more than offset this rather small parking loss with funds already provided by the State, as explained hereinafter. As shown in the affidavit of Mr. Rawlings, only 23.2 of the 26 acres in the right-of-way are actually for road use, the balance being for easements and the pedestrian overpass at the zoo entrance.

The determination that Interstate Route I-40 should pass through Overton Park was originally made by the Bureau

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to reach the western downtown area and the new bridge now under construction across the Mississippi River, a distance of approximately twelve miles over congested city streets already taxed to their limit. The record is clear that the need for the road actually arose more than ten years ago, so that today, this need has now evolved into an urgent, absolute necessity.

[14] Petitioners constantly quote from a statement attributed to someone from the Department of the Interior that, after the taking, "there won't be much in the way of a wooded area left." Petitioners made this statement to the Court on December 7, 1970, during oral argument. This statement could not have been made by anyone who had seen the Park or the plans. Simple arithmetic tells us that this statement is not only untrue, but also grossly irresponsible. There are, as stated, 170 acres of woodland in the 342-acre Park. The entire taking, including easements, is only 26 acres out of the whole. Of these 26 acres, only slightly more than half contain any trees. The rest is either grassy shoulders to the bus route, concrete, or gravel parking lots. With at least 155 acres of trees left, the Interior Department statement cannot be accurate.

of Public Roads[15] in 1956 — more than eleven years before the enactment of 23 U.S.C. §138; the decision was reaffirmed in 1966, 1968, and 1969 [see affidavit of Edgar H. Swick, Deputy Director of the Bureau of Public Roads, App., pp. 27, 28]. Swick attested [Swick Aff., App., p. 27] that "[a]ll alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments." As he further explained [Swick Aff., App., p. 27]:

> "For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons, and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the cost of the chosen route by many millions of dollars."

In 1967, prior to the effective date of the original version of 23 U.S.C. §138, the Secretary authorized acquisition of the right-of-way on either side of the Park, and most of that land has now been purchased and cleared.

Interstate Highway I-40, as Mr. Rawlings pointed out, is part of the total east-west expressway system for the City. Memphis, at present, has no highway of this type, leading from the business or downtown section of the City, located on the City's western edge at the Mississippi River, to its most dense residential areas on the eastern edge of town.

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[15] At this time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act [49 U.S.C. §1651 *et seq.*], which became effective on April 1, 1967, transferred the Bureau of Public Roads to the new Department of Transportation [49 U.S.C. §1655].

This road will be approximately twelve miles long and will connect on the west with a new Mississippi River bridge now under construction. The route is practically a straight line except for a slight bend at the Park, designed to follow and take advantage of the bus route and avoid the zoo and, hence, minimize harm to the Park. In this route were 1,687 separate parcels of land, including the Park, which is counted as one parcel. All but two have been acquired, and over 1,400 residences, stores and industrial buildings have been removed or are in the process of removal. All but a handful of the people who occupied these lands and buildings have been relocated, and large portions of the highway are under construction [see Rawlings affidavit, App., p. 128; see also 16 aerial photographs taken of the route itself verified by affidavit of Don Newman, App., p. 157].

Petitioners, in their statement of facts, claim that the present route will displace more people than one suggested alternate and nearly as many as the other. Even if this had been true before Interstate 40 were begun, this claim ignores the fact that, when the Secretary approved the route under the Parklands Statute, most of the people on the present route had already been displaced.

For the part of the route through the Park, the state of Tennessee engaged in long and tedious negotiations with the city of Memphis to acquire the actual land needed. These negotiations terminated in a payment by the State to the City of $2,000,000 for the 26 acres and $206,000 to the Memphis Park Commission to enable it to build additional parking, move a wooden picnic pavilion so that it will not be too close to the highway and to relocate certain utilities that may be affected. The City deeded the property to the State sometime prior to the inception of this case in Washington, D.C.[16]

The affidavits already referred to, plus others in the rec-

[16] The city of Memphis is required by law to replace any parklands so taken with additional parks. The ordinance in question is as follows:

"ORDINANCE NO. 408

"Section 1. ". . . In the event any lands under the control and

ord, made by responsible persons not parties litigant or retained in connection with this litigation, clearly show that the planning and design of this route has been a long and careful undertaking [see affidavit of D. W. Moulton, former Commissioner of the Tennessee Department of Highways, App., p. 141; affidavit of Luther W. Keeler, Engineer with the Tennessee Highway Department, App., p. 133]. This entire highway project, including the segment through the Park, evolved only after long and careful planning, with complete cooperation between all governments involved and their various representatives, both elected and appointed. The affidavits and other proof submitted in support of Respondents' motion for summary judgment clearly show that every conceivable manner and means of finding suitable alternates and of minimizing harm to the Park have been explored in good faith, and that many new thoughts were

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jurisdiction of the Memphis Park Commission are sold, taken through proceedings in eminent domain, transferred to another department of the city, or otherwise diverted from use as park lands, the Memphis Park Commission shall be paid the fair market value of the lands involved, together with such incidental damages as are allowed by law and such funds shall be used by the Memphis Park Commission for the purchase of additional park lands and for no other purpose."

As an actual fact, the city of Memphis, in complying with this ordinance, has already used $1,000,000 of the funds paid to it by the state of Tennessee to purchase a 160-acre park containing a golf course, and anticipates that it can acquire that much more park land with the remaining $1,000,000. The city of Memphis now operates more than 4,700 acres of parks [see affidavit of Hal S. Lewis, App. p. 112]. One of the gravest problems Respondents face, should the present route be changed, is the disposition of the 26 acres of Overton Park already acquired by the State.

Petitioners contend the route through the Park was chosen because it is cheaper. While there is no proof in the Record of the total costs of alternate routes (including the right-of-way already acquired outside the Park), this Court cannot find that $2,206,000 is "cheap" for 26 acres of right-of-way, especially in view of high construction costs to minimize harm to the Park [see Michael affidavit, attached to Respondent's reply to Petitioners' Application for a Stay].

adopted from time to time, necessitating changes in design which, although they delayed the project, were thought to be beneficial to the Park.

The route chosen was designed to minimize damage to the Park [see Swick affidavit, App., pp. 28-30]. Thus, the highway is to follow the path of an existing bus road, presently 40 to 50 feet wide, widening it to from 250 to 450 feet, including a 40-foot-wide, landscaped median strip. The approved plan calls for the new roadway to be depressed below ground level so that traffic on the highway will not be visible to users of the Park; in only one area, where the highway crosses a creek, it will not be depressed, since to do so would cause serious drainage problems.

On November 5, 1969, the Secretary again approved the plans for the Overton Park highway. A proposal that the interstate road be tunneled by boring under the Park was then found unacceptable because the cost would have been about $107,000,000, as compared to $3,500,000 for the depressed route;[17] moreover, it presented difficulties of construction, drainage, concentrated air pollution at ventilation points, and traffic safety. Another proposal that the highway be built in a cut and covered at ground level was unsatisfactory for similar reasons; it would have cost approximately $41,500,000, and would not have preserved the original park vegetation [see Swick affidavit, App., p. 28]. In issuing his approval of the route, the Secretary required certain design changes intended to minimize dam-

[17] All of these cost figures were based upon estimates made by both the State and Federal governments. The actual bid received on the proposed design was $5,366,000 [see this Respondent's reply to Petitioners' Application for a Stay] or some fifty percent more than the original estimates. This was undoubtedly due to rising construction costs. Consequently, it is reasonable to assume that the estimates for the two types of tunnels should be revised proportionately—over $160,000,000 for a bored tunnel and over $60,000,000 for a cut-and-cover type tunnel. Though cost is by no means a controlling factor, this Respondent does feel, as stated by the Court of Appeals, that it is a legitimate consideration.

ge to the Park; these changes were accepted by the state f Tennessee.

There are no affidavits or other evidence supplied by Petitioners which in any way *dispute* the facts that have ust been stated. The affidavits and other evidence of Petitioners can be basically characterized in one of three ways:

1. Opinions by experts and others that alternate routes do exist, although they do not state or claim that Respondent Volpe or others have not properly considered them. The affidavit most relied upon by Petitioners in this regard is that of Robert Conradt [App., p. 92], a "professional consultant in transportation planning," who came to Memphis for this litigation. This affidavit will be discussed in the argument on Issue Number Five.

2. Opinions by experts that various construction proposals are "possible" or "feasible" from an engineering point of view, without consideration of any other important factors, such as disruption of the community, social factors, safety factors, environmental factors, costs, or time factors. These will also be discussed in the argument.

3. Statements that because Respondent Volpe or his Department has approved tunnels in other situations, it is mandatory that he do so in this case.

Petitioners' affidavits and complaint assert no facts which put into dispute the established facts as to the manner in which the Secretary approved the route and design of the highway through Overton Park. No fact is alleged by Petitioners which suggests that the Secretary failed to consider any relevant plan, proposal, opinion, fact or theory in approving the route. The facts surrounding the manner of making the choice are not disputed. As correctly stated by the Court of Appeals, "the only issue [raised by these affidavits] is the wisdom of the choice" [Opinion, p. 10].

IV. THE STATUTES INVOLVED

The two major statutes involved in this case (49 U.S.C. §1653(f) and 23 U.S.C. §138) are quoted in full below, along with their original versions, dates of enactment, and effective dates. All relevant legislative history is indicated.

The first expression of a national policy in regard to parklands made by Congress insofar as this case is concerned was in Section 4(f) of the Department of Transportation Act,[18] passed October 15, 1966, and which became effective by executive order on April 1, 1967 [see Executive Order No. 11340, 32 F.R. 5453 (May 30, 1967)]. This section, quoted below, was the predecessor to the present 49 U.S.C. §1653(f):

> "(f) The Secetary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

This section quoted above, as well as the original version of 23 U.S.C. §138 (which appears in full below) were amended on August 23, 1968, and both new provisions took effect on that day:

> "(f) It is hereby declared to be the national policy that special effort should be made to preserve the

[18] See footnote 14. The Department of Transportation Act, §12 [Pub. L. 89-670, §12, 80 Stat. 931 *et seq.*], provided that all orders, determinations, contracts, and the like issued or effective before the effective date of the Act "shall continue in effect according to their terms" until modified or terminated. Thus, the route having been properly approved prior to the effective date of the Department of Transportation Act, the Secretary and his predecessors could have relied on this saving provision to protect their prior approval of the route.

natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

The original version of what is now 23 U.S.C. §138 contained in the Federal-Aid Highways Act was passed on September 13, 1966, but did not take effect, insofar as the Secretary's duties were concerned, until July 1, 1968, by its own terms. This original section is as follows:

"§138. Preservation of parklands

"It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of

this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use."

As stated above, this statute reached its present form by amendment, effective August 23, 1968, so that this statute and 49 U.S.C. §1653(f) now read identically (both sometimes hereinafter called the "Parklands Statute"):

§138. Preservation of Parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreational area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

The amendments were for the obvious purpose of making it

clear that the statutes do not constitute a mandatory prohibition against using the enumerated lands, but rather a discretionary authority vested in the Secretary.[19]

The legislative history points out that although Congress wants to protect the enumerated lands, it considers its use highly preferable to displacing large numbers of people.[20]

Conference Report No. 1799, which contains the Statement of the Managers on the Part of the House [1968 *U.S. Code Cong. & Adm. News,* p. 3538], reads in part as follows:

> "This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority." [Emphasis in original]

There can be no question whatsoever that Congress specifically intended that this was merely a discretionary enactment with the discretion vested solely in the Secretary of Transportation.[21]

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[19] The language of the Parklands Statute itself indicates that Congress intended that the Secretary have wide discretion. A judgment as to whether an alternative route is "feasible and prudent" must be one involving great discretion. Similarly, it is a discretionary determination to decide what planning is "possible" to minimize damage to parkland.

[20] 1968 U.S. Code Cong. & Adm. News, at 3500.

[21] Petitioners have contended below that certain debates in the Senate counter the conclusions of the Conference Report quoted in the text. Particularly, Petitioners contend that the remarks of Senator Cooper, during his discussion with Senator Randolph [reported in 114 Cong. Rec. 24032,3 (1968)], show that the Parklands Statute was not intended to vest discretionary authority in the Secretary. However, a careful reading of this discussion shows the contrary to be true. As shown by his remarks in 114 Cong. Rec. 24036 (1968), Senator

An examination of these statutes in context is helpful to the brief which follows. The Department of Transportation Act [Pub.L.89-670, as amended] includes the Parklands Statute as §1653(f) as codified. This Act does not prescribe any procedure under the Parklands Statute, but transfers to the Secretary the duties formerly in the Department of Commerce under Title 23 of the United States Code, includuing the Federal-Aid Highway Act of 1966 [49 U.S.C. 1655(a)]. Section 1653, containing the Parklands Statute as a statement of policies, also includes other such statements, in articulating the responsibilities of the Secretary. Thus, the Secretary is charged not only with the responsibility of protecting park land, but also with the responsibility of providing safe and efficient transportation, pollution and noise control, and a host of other responsibilities [see 49 U.S.C. §1653(a)]. One must then look to the

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Cooper was concerned that the bill, as reported out of conference (and described in the Conference Report quoted) granted the Secretary too much discretion to approve highways through parks. In the discussion with Senator Randolph which Petitioners cite, Senator Cooper responded to a question as to whether the Secretary, under the conference bill, had discretion to *not approve* a project through a park found *not* to be of state or local significance by local officials (the act appearing on its face to apply only to parks so found to be of state or local significance), and Senator Cooper replied that the Secretary did have this discretion (apparently because the Act also allowed Federal officials to make the necessary determination of significance). This discussion has no relevance here, except to show that even Senator Cooper thought that the statute which was passed gave the Secretary wide discretion. There is no issue here that Overton Park is not of local significance; this is admitted. The issue is, having determined this significance, does the Secretary have discretion to approve the project. Such discretion is clearly shown in the legislative history. This is fortified by the fact that Senator Cooper, who thought the Act gave the Secretary more discretion to approve projects than he would have done, voted against the act [114 Cong. Rec. 24038 (1968)]. To interpret the Parklands Statute as Senator Cooper would have liked, but obviously deemed improper (judging from his vote), would erase all meaning from the last clause of the Statute beginning "unless."

Federal-Aid Highway Act for procedural and other policy guidance.

In general scheme, the Federal-Aid Highway Act provides the procedures by which the states are to construct highways under various programs of Federal financial assistance, including the National System of Interstate and Defense Highways [23 U.S.C. §103(d)]. The state highway department submits a program of highway construction to the Secretary, for his approval [23 U.S.C. §105]. After program approval is obtained, the state highway department then submits plans for specific highway projects for Secretarial approval; if the Secretary approves a project, this constitutes a contractual obligation of the United States to provide the financial assistance involved [23 U.S.C. §106(a)]. This latter section provides that, in making his approval, "the Secretary shall be *guided*" (emphasis supplied) by certain standards contained in 23 U.S.C. §109. By this language, these standards are intended as guides or policy statements for the Secretary to look to, not as limitations on his sound discretion in granting or withholding approval. These standards contained in 23 U.S.C. §109 relate to highway safety, regulatory and warning signs, uniformity of design in the Interstate System, maintenance, and the like. Other sections of the Act refer to the manner of payment of the Federal share of highway costs, control of billboards, state public hearings, safety, and the like. While §106, governing the approval of a project, does not refer the Secretary to the Parklands Statute (§138) for guidance, as it does to §109, the Parklands Statute itself is framed in terms of the Secretary's approval of the program or project. The Parklands Statute does not say "No highway shall be built through a Park unless. . . ." It says that "the Secretary shall not approve any program or project. . . ." Therefore, speaking in terms of "approval" as it does, it would appear that Congress intended the Parklands Statute to be a guide to approval under §106 as it intended for the standards in §109.

In the acts of Congress containing the Parklands Statute

now codified as 23 U.S.C. §138 [Pub.L. 89-574, Sept. 13, 1966; Pub.L. 90-495, Aug. 23, 1968], Congress also gave the Secretary certain other policy declarations as guides, now found in 23 U.S.C. §101(b). In these Acts, Congress found that many present highways are inadequate to meet transportation and defense needs, and therefore stated:

> "It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways . . . is essential to the national interest and is one of the most important objectives of this Act." [23 U.S.C. §101(b)]

Thus, we see that Congress presented to the Secretary many declarations of national policy, including that of the preservation of parklands, as guides to his discretionary authority in approving highway projects. Under these Congressional pronouncements, it is for the Secretary, in each instance, to weigh these policies and apply them to the facts and circumstances of each project presented for his approval. The Secretary cannot be guided by the Parklands Statute alone, but must give consideration to each statement of policy which Congress handed down for his guidance. In a like vein, this Court must read these sections of the Act together and construe them in *pari materia* in seeking meaning from the Parklands Statute. As this Court recently stated in *Richards* v. *United States,* 369 U.S.1 (1962), at page 11:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy'."

[See also *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States,* 377 U.S. 235 (1964).]

V. SUMMARY OF ARGUMENT

In the lower courts, Petitioners raised certain issues regarding claimed errors on the part of Respondent Speight

in the process of approving the highway project. These issues have not been raised in this Court, so that, strictly speaking, there are no remaining issues in this case relating directly to the state of Tennessee. This places Respondent, in this brief, in the unusual position of arguing points on behalf of the Secretary. Respondent feels, however, that this is not only proper, but helpful to the Court since, in economic reality, the rights of the state of Tennessee are dependent on the rights of the Secretary in this matter. Respondent further feels that such argument is necessary because the Solicitor General has taken a position on certain points contrary to that of the state of Tennessee.

Respondent contends that neither the Department of Transportation Act nor the Federal-Aid Highway Act, both of which include the Parklands Statute among their provisions, contains any requirement that the Secretary issue written findings or record the reasons for his approval of this highway project. All that is required is that the Secretary, in fact, approve the project, which is an action placed by Congress within the Secretary's discretion. However, if findings that the approval conformed to the Parklands Statute were required, such findings may, by operation of law, be implied from the approval itself. Petitioners admit that the Secretary did approve the project, and Respondents admit that, in so approving it, he did not issue written findings. Cases cited by Petitioners wherein an administrative officer was required to issue findings are all distinguishable, as these are all cases where an agency hearing was required; no such hearing was required of the Secretary in approving the project.

Also, findings are not required in this case by the Administrative Procedure Act, as that Act has no application here. The Administrative Procedure Act is applicable to procedings of the Department of Transportation, but only to the extent that the Act, by its own terms, applies. Section 553 of the Administrative Procedure Act does not require findings here, as the Secretary's approval is expressly excluded because it creates a contract under 23 U.S.C.

§106(a). Section 554 of the Administrative Procedure Act does not require findings either, as that section relates only to decisions from an agency hearing, which did not exist in this case.

The provisions of the Administrative Procedure Act regarding judicial review [5 U.S.C. §§701, *et seq.*] also have no application here. Section 701 excludes from that chapter, by its terms, "agency action . . . committed to agency discretion by law." The Secretary's approval here was a discretionary action, and is, therefore, not reviewable under the Administrative Procedure Act. Judicial review is, of course, available under the law outside that Act if it were shown that the Secretary failed or refused to exercise his discretion or acted beyond the scope of his powers, but there is no such showing here by Petitioners.

The Courts below were correct in not allowing Petitioners to take the discovery deposition of the Secretary or the former Highway Administrator. Since all relevant facts as to the approval of the projects and the things considered by the Secretary in making that approval are not in issue, the only possible subject of such a deposition would be the Secretary's mental processes in linking the two. Such a subject for discovery is precluded by *United States* v. *Morgan,* 313 U.S. 409 (1941).

There is no justification to the claim of Petitioners that this Court must have before it the entire administrative record in order to decide the case. There cannot be anything in the administrative record helpful to our inquiry here, as all facts relevant to the issues before the Court are either admitted or undisputed. While Respondent contends that the introduction of the administrative record is not required here by the Administrative Procedure Act, that Act not being applicable, it is Respondent's position that even if that Act were applicable, §706 thereof requires the introduction of only that part of the administrative record which the parties choose to submit. Petitioners had access to the administrative record and could have introduced whatever part they deemed helpful to their cause.

Petitioners must prove that the Secretary was arbitrary and capricious to get the relief sought, because that is the standard for relief under the law outside the Administrative Procedure Act. However, even if we assume that the Administrative Procedure Act applies here, that Act requires substantially this same standard of review. Section 706 of that Act provides that the standard of review of whether there was substantial evidence to support the approval or whether the evidence was unwarranted by the facts applies only to agency actions based on agency hearings. Since there were no hearings required here, only the "arbitrary and capricious" standard in §706 can apply.

Finally, respondent contends that there are no disputed issues of material facts in this case, such that the summary judgment granted below was proper. All facts relating to both the fact and manner of the approval of the Secretary are admitted or undisputed. Petitioners have not shown any fact which suggests that the approval of the Secretary was arbitrary or not in conformity with law. The only dispute which the affidavits submitted by Petitioners have raised in this case is a dispute as to the wisdom of the Secretary's approval. Under the long-standing rule that courts will not substitute their discretion in selecting a highway route for that of the executive, this is not a proper issue before the Court and, therefore, not material on a motion for summary judgment.

Therefore, Respondent contends that there was no error committed by the lower courts, that the decision of the Court of Appeals should be affirmed, and that the stay should be dissolved.

VI. BRIEF AND ARGUMENT OF QUESTIONS PRESENTED

In the discussion below, the five issues raised by Petitioners in their application for a stay (treated as a petition for certiorari) are treated separately. Discussion of the sixth issue suggested by Respondent, relating to the application of the Administrative Procedure Act, is integrated into the arguments on Petitioners' five suggested issues, particularly Issue Number One.

ISSUE NUMBER ONE
THE LACK OF A SPECIFIC FINDING OR WRITTEN OPINION BY THE SECRETARY

This issue relates to the legal impact of the Secretary's failure, in approving the route and design through the Park, to issue written findings giving his reasons for the approval. As the counsel for the Secretary has stated: "It is undisputed that the Secretary, on the occasion of his 1969 approval of the Overton project, issued no written findings and wrote no opinion."[22]

This is the only real issue raised by the Petitioners in the pleadings quoted earlier and was a proper issue to be decided upon a motion for summary judgment by both lower courts, since purely a question of law is presented thereby. Affidavits which show that the Secretary did *approve* the project were introduced, but were unnecessary, since petitioners have specifically alleged that the Secretary did *approve* the project. Petitioners do not contend that the Secretary did not consider the dictates of the Parklands Statute in giving that approval. In fact, it is admitted in the complaint that the Secretary conditioned his approval on design changes intended to minimize harm to the Park and that the State agreed to these design changes. Petitioners do contend that those actions and approval do not suffice; they argue that, in addition, the Secretary must go through a process of reducing to writing the various factual and opinion evidence which he might have considered in exercising his discretion, and the reasons for his approval of the highway project. The question then squarely presented is whether or not this is required by the Parklands Statute.

Both lower courts have held that this is not required. The District Court said:

> "It is undisputed that the Secretary did not make such a finding but there is no such requirement in the statute, and in the absence of such a requirement we will not imply one."

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[22] Solicitor General's Memorandum filed in opposition to Petitioners' Application for a Stay, p. 7.

The Court of Appeals said:

> "There is no requirement in the statute that the Secretary articulate his findings, nor are we free to impose such a requirement on him."

An examination of the Parklands Statute shows these courts to be correct. The Parklands Statute turns on the question of the Secretary's "approval," and that "approval" is left entirely within his sound discretion. It was both admitted and proved that the Secretary and his predecessors had given the necessary "approvals," both of the "corridor" or route and the present design.

As shown above, the Parklands Statute is entirely discretionary and in no way imposes ministerial duties on the Secretary. The legislative history previously cited shows beyond any question that Congress "unmistakenly" wanted the Secretary to exercise *his discretion* in granting or withholding his *approval* of Federal-Aid under 23 U.S.C. §138, while at the same time keeping in mind even more important factors, such as the disruption of communities and time.[23] No section of either the Department of Transportation Act or the Federal-Aid Highway Act requires the Secretary to issue written "findings" in giving or withholding his approval of a project.

There are additional reasons other than those already given why the Secretary's approval did not have to be reduced to a finding. First, it has always been a basic principle of administrative law, upheld on many occasions by this Court, that under circumstances as presented here, "findings" can be implied.

The weight of authority both in the State and Federal

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[23] The Federal-Aid Highway Act specifically states that time is of the essence in the early completion of the "Interstate System" since many highways are inadequate to meet the needs of local and interstate commerce or national and civil defense. It further states that early completion of the System is "one of the most important objectives of this Act," and is essential to the national interest [23 U.S.C. §101(b)]. Respondent submits that the Secretary is charged with administering this entire Act, not just §138 alone.

judicial systems is that when an executive or administrative officer is granted discretion by the legislative body, as here, findings, if required at all, are implied from the action taken [see Vol. 2, Davis, *Administrative Law Treatise,* 1958, §16.07].

As early as 1827, this Court, speaking through Mr. Justice Story, proclaimed this principle [*Martin* v. *Mott,* 25 U.S. (12 Wheaton) 19 (1827)]. In that case, the President, by an act of Congress, had been given the power to call out the militia in the event certain specified conditions threatening the national safety were found to exist. The President called out the militia of the state of New York without stating or reciting that any of the conditions existed, or that he had found, in his judgment, that they did exist. In holding that the necessary findings were implicit in the President's order, this Court said, at page 14:

> "But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, *the presumption is, that it is exercised in pursuance of law.* Every public officer is presumed to act in obedience to his duty, until the contrary is shown;

and *a fortiori,* this presumption ought to be favorably applied to the chief magistrate of the Union." [emphasis added]

This Court has continued to rule that the holdings of Mr. Justice Story apply to orders of administrators as well as the President [see *Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176 (1935); *Thompson* v. *Consolidated Gas Co.,* 300 U.S. 55 (1937); *United States* v. *Rock, Royal Co-Op.,* 307 U.S. 533 (1939)].[24]

There is a corollary to this rule which is also relevant to the issue raised by Petitioners concerning the necessity of showing arbitrary or capricious conduct on the part of the Secretary. The Court of Appeals, on page 4 of its opinion, correctly stated this additional rule with ample authority, as follows:

> "In addition to the narrow scope of review of administrative action, plaintiffs are faced with the additional burden of overcoming a presumption of regularity afforded the acts of an administrator. See *Goldberg v. Truck Drivers Local Union No. 299,* 293 F.2d 807, 812 (6th Cir.), *cert denied* 368 U.S. 938 (1961); *Nolan v. Rhodes,* 251 F.Supp. 584, 587 (S.D. Ohio 1965), *aff'd* 383 U.S. 104 (1966). The presumption of regularity is a particularly strong one. See, *e.g., Braniff Airways, Inc. v. C.A.B.,* 379 F.2d 453 (D.C. Cir. 1967)."

The authorities heretofore cited by Petitioners in support of their position that a "finding," in addition to "approval," was necessary, are easily distinguished. All are cases which involved statutes where a quasi-judicial "hearing" of some

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[24] The case of *United States v. Baltimore & Ohio R.R.,* 293 U.S. 454 (1935) is seemingly out of line with these holdings. As pointed out by Professor Davis in his treatise, *supra,* the Court's decision in this case may have been influenced by the fact that it was decided the same day as *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), which involved a bad example of administrative abuse. The dissenting opinion by Mr. Justice Cardozo in this case is particularly enlightening on this subject.

sort was required to be held.[25] Normally in such situations, one would expect some sort of finding to be rendered. The Parklands Statute does not require or even suggest any sort of hearing.

The only hearings of any kind required by any statute here relevant are those conducted by the State, not the Secretary, under 23 U.S.C. §128. These hearings are of the "informational" type required to be conducted by the State, and are not under the control of the Secretary, although the transcript and accompanying documents are sent to the Department. These hearings would not require any findings by the Secretary, who does not even participate in them personally or by delegation.[26]

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[25] For example, *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968), *Reh. Den.* 393 U.S. 1124 (1969), was a case where this Court required the Interstate Commerce Commission to make specific findings regarding their prescription of the divisions of joint rates for certain railroads, under 49 U.S.C. §15 (6), which statute requires that the rates described therein be determined "after full hearing upon complaint or upon its own initiative . . . ." This statute, under which the Commission operated, also required that the Commission prescribe these rates "by order." This is a very different thing from an "approval" as required in the Parklands Statute. An "order" is defined in the Administrative Procedure Act as the result of an adjudication [5 U.S.C. §551 (6)], which is a hearing on the merits of an issue in controversy [§§551(7), 554(a)], there what rates were just. Where, as in the *Baltimore & Ohio* case, agency hearings resulting in an order are required, then it follows that the Administrative Procedure Act required detailed findings as to the results of that hearing and reasons for that order. *United States v. Carolina Carriers Corp.*, 315 U.S. 475 (1942), quoted by Petitioners, is another case where an agency quasi-judicial hearing was being reviewed.

[26] The full transcript of these hearings in this case is already part of this record, so that if it were material to the issues, it would not need to be supplied by the production of an "administrative record" on remand. Petitioners claimed below that the §128 hearings held on the subject project were blemished by certain procedural defects. Both lower courts found no such defects, and Petitioners appear to have abandoned this claim in this Court.

Therefore, Respondent contends that it is established that the Parklands Statute gives the Secretary a discretionary power to approve or not approve the project; that he did approve it; that "findings" are not required by the Statute, but, if "findings" were required, these may be implied from his approval; that his acts are accompanied by a strong presumption of regularity not overcome by any evidence or allegation on the part of Petitioners; and that no quasi-judicial hearing is required by the Parklands Statute which could be a basis for such "findings."

Any discussion of the necessity of written and detailed findings by the Secretary in this case must take into account the application and impact of the Administrative Procedure Act [Pub.L. 89-554, Sept. 6, 1966; 5 U.S.C. §551, *et seq.*]. First, the State certainly concedes that the Administrative Procedure Act is expressly made applicable to "proceedings by the Department" of Transportation by §6(h) of the Department of Transportation Act [49 U.S.C. §1655(h)] which reads as follows:

> "(h) The provisions of subchapter II of chapter 5 and of chapter 7 of Title 5, shall be applicable to *proceedings by the Department and any of the administrations or boards within the Department* established by this chapter except that notwithstanding this or any other provision of this chapter, the transfer of functions, powers, and duties to the Secretary or any other officer in the Department shall not include functions vested by subchapter I of chapter 5 of Title 5, in hearing examiners employed by any department, agency, or component thereof whose functions are transferred under the provisions of this chapter." [Emphasis added]

By 49 U.S.C. §1655(h), the Administrative Procedure Act is made applicable to "proceedings by the Department and any of the administrations or boards within the Department," but it does not apply to approvals by the Secretary. The term "proceedings" implies hearings and similar agency adjudications, but not discretionary approvals by

the Secretary himself. More important, this section does not purport to enlarge the scope of the Administrative Procedure Act itself; it merely states that, for the Department of Transportation, as for other departments of the government, the Administrative Procedure Act applies according to its own terms. Therefore, to determine the application of the Administrative Procedure Act to the approval of the Secretary now in question, we must look to the terms of that Act.

Subchapter II of Chapter 5 of the Administrative Procedure Act [5 U.S.C. §§551-559] is the part thereof relevant to the question of whether the Secretary was required to make findings here. One cannot contest that the Administrative Procedure Act does require, in many instances, findings such as Petitioners seek; the question here is whether the Secretary's approval of the route through Overton Park is one of those instances.

The Department of Transportation Act holds the Administrative Procedure Act Applicable to "proceedings," a term defined in 5 U.S.C. §551(13) as either "rule making," "adjudication," or "licensing." There can be no question that the approval of the route by the Secretary was not licensing. However, since by definition, "licensing" is included within the definition of "adjudication" [see together 5 U.S.C. §551(6) and (7)], if the sections of the Administrative Procedure Act regarding "adjudication" do not apply here, "licensing" is also excluded. One must then inquire if the provisions of the Administrative Procedure Act governing the proceedings "rule making" or "adjudication" apply to the Secretary's approval.

Section 553 of the Administrative Procedure Act. [5 U.S.C §553] governs its applicability to rule making. That section reads in relevant part:

> "(a) This section applies, according to the provisions thereof, except to the extent that there is involved—— . . .
>
> (2) a matter relating to agency management or

personnel or to public property, loans, grants, benefits or contracts."

Looking to the Federal-Aid Highway Act, we see that the approval of the Secretary in this instance is a "grant" and a "contract," taking that approval out of the view of the Administrative Procedure Act. First, the whole impact of the Federal-Aid Highway Act, of which the Parklands Statute is a part, is to make grants to the many states for the construction of highways [see 23 U.S.C. §101, *et seq.*]. More specifically, §138 of that Act relates to the Secretary's approval of a project, which approval is governed by §106 of the Act. This latter section states that the Secretary's "approval of any such project shall be deemed a contractual obligation of the Federal Government . . . ." [23 U.S.C. §106(a)]. Therefore, by the explicit terms of the Federal-Aid Highway Act, the Secretary's approval of the route is excluded from the requirements of §553 of the Administrative Procedure Act.

Section 554 of the Administrative Procedure Act governs its applicability to adjudications. This section, by its explicit terms, applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ." The section then proceeds to determine the procedure for such hearings, being in the nature of quasi-judicial hearings to reach "a *final* disposition" [5 U.S.C. §551(6)] of the matter in controversy. Since §554 applies here only if the Federal-Aid Highway Act requires a determination "on the record after opportunity for an agency hearing," an examination of the Federal-Aid Highway Act reveals that no such determination or agency hearing is required thereby, taking the Secretary's approval outside the view of §554. The only mention of a hearing in the Federal-Aid Highway Act is in §128 thereof, which requires as a condition precedent for receiving Federal aid a hearing to be held by the state highway department. The function of this hearing, as stated in the section, is to insure that the state highway department has considered certain aspects of highway planning, such as social

impact, and has given interested persons an opportunity to express their views. It is not a quasi-judicial hearing [see *Hinrichs* v. *Iowa State Highway Commission,* 260 Iowa 1115, 152 N.W.2d 248 (1967)], nor a hearing for the purpose of reaching a "final disposition" of an issue in controversy. It is a fact-gathering or informational hearing, designed to enable the state highway department to gather certain opinions and information and offer explanations of its plans to local citizens. [For legislative history to this effect, see 1968 *U.S. Code Cong. & Adm. News,* p.3491.] Most important, the hearing contemplated is one conducted by the *state* highway department, not an *agency* hearing. Nowhere does the Federal-Aid Highway Act require an *agency* hearing, as contemplated as a condition for the application of §554 of the Administrative Procedure Act.[27] Therefore, §554 does not apply to the present situation.

Concluding, we see that neither of the types of "proceedings" covered by the Administrative Procedure Act — rule making or adjudications — encompasses the approval of the Secretary here in question. Therefore, the Secretary's approval is not a "proceeding" within 49 U.S.C. §1655(h), and is not governed by the Administrative Procedure Act. This being the case, the Administrative Procedure Act places no obligation on the Secretary to make findings when approving a highway project.

Petitioners may argue that such a construction renders 49 U.S.C. §1655(h) meaningless. A casual glance at the Department of Transportation Act obviates this argument. That Act transferred to the then newly-created Depart-

[27] Where, as here, the particular governing statute regarding a Secretary's action (here the Federal-Aid Highway Act and the Department of Transportation Act), does not provide for an agency hearing, no requirement for such a hearing is implied into that particular statute by the Administrative Procedure Act. "The Administrative Procedure Act does not impose any requirement of an adversary hearing before an agency; it merely specifies the procedure to be followed when a hearing is required by some other statute." *United States v. Walker,* 409 F. 2d 477 (4th Cir., 1969).

ment of Transportation many functions other than approval of highway projects, and most of these other functions are brought within the purview of the Administrative Procedure Act by 49 U.S.C. §1655(h). As a few examples, the proceedings of the National Traffic Safety Bureau [49 U.S.C. §1652(f)], the National Transportation Safety Board [49 U.S.C. §1654], and the Federal Aviation Agency [49 U.S.C. §1655(c)] are transferred to or established in the Department of Transportation, and these would be governed by the Administrative Procedure Act.

Not only do the provisions of the Administrative Procedure Act governing the making of findings and other procedure within the agency not apply to the Secretary's approval, but also the provisions of that Act regarding judicial review have no application. These are found in Chapter 7 of the Administrative Procedure Act [5 U.S.C. §701, *et seq.*].

Section 701(a), 5 U.S.C., reads:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that— . . .
>
> (2) agency action is committed to agency discretion by law."

Not only is the purely discretionary nature of the Secretary's approval shown by the language of the Parklands Statute, but the legislative history, quoted above, shows that Congress intended that the selection of a route through a park is within the sole discretion of the Secretary [1968 *U.S. Code Cong. & Adm. News,* p.3538] Because this approval is explicitly committed to agency discretion by Congress, Chapter 7 of the Administrative Procedure Act has no application.

This Court, as well as the lower Federal courts, has consistently held that an action of an executive, left by law within his discretion, is made nonreviewable by the courts under the Administrative Procedure Act [5 U.S.C. §701(a)(2); *Schilling* v. *Rogers,* 363 U.S. 666, 674 (1960); *Panama Canal Co.* v. *Grace Line,* 356 U.S. 309, 317 (1958)]. Professor Davis has stated that this exclusion of judicial re-

view applies not only to rule making and adjudications left within agency discretion, but also to all discretionary actions of the executive, including cabinet members [Vol. 4 Davis, *Administrative Law Treatise,* 1958, §28.16[28]]. This leaves judicial review of the Secretary's approval under the provisions of law in effect without application of the Administrative Procedure Act.[29] There is no basis for any such review here, however, as, in the *Schilling* case, *supra,* "This is not a case in which it is charged [by Petitioners] that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers . . . . " [363 U.S. at p.676]. For administrative actions committed by law to agency discretion, and thereby outside the scope of judicial review provided in the Administrative Procedure Act, judicial review is available only if it is charged that the Secretary had acted outside the scope of his discretion given by Congress. No such charge is made, Petitioners limiting their complaint to the

[28] Professor Davis also states, regarding 5 U.S.C. §701(a) (2), that this Section appears to hold that agency actions committed by law to agency discretion are not reviewable by Courts even if such actions are alleged to be arbitrary or capricious. We need not go so far in the present case, because, as will be shown in the discussion of Issue Number Four, Petitioners have made no charge that any action taken by the Secretary was arbitrary or capricious [see also 5 U.S.C. §101, which deems the Department of Transportation an "Executive Department"].

[29] The Transportation Department Act, in this regard, provides that orders or actions of the Secretary in the exercise of functions transferred to him by that Act, such as the approval of highway projects, shall be subject to judicial review to the same extent as they were before the transfer. The Transportation Department Act specifically does not purport to enlarge the scope of judicial review of the Secretary's actions [see 49 U.S.C. §1653(c)].

charge that the Secretary failed to make written findings (and others not here relevant).[30]

Even if this were not a discretionary action on the part of the Secretary, and judicial review under the Administrative Procedure Act were possible, this would not lead to a reversal on the question of findings for two reasons. First, findings as required by the Administrative Procedure Act are not applicable to this Secretarial approval, as shown above. Second, even if such findings were required, the failure to make them would be harmless error. The Administrative Procedure Act states that in a judicial review of administrative action, " . . . due account shall be taken of the rule of prejudicial error" [5 U.S.C. §706].

In *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States, supra,* this Court faced the contention of a charterer of a ship owned by the Federal government that the Maritime Commission had erred in setting charter rates without articulating which section of the Merchant Ship Sales Act of 1946 it relied on. This is quite similar to Petitioners' claim in the present case that they were harmed by the Secretary's failure to make written findings. In *Massachusetts Trustees, supra,* this Court held that "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached, as in this instance (assuming

[30] In *Sugarman v. Forbragd,* 405 F. 2d 1189 (9th Cir., 1968), *Cert. Den'd.* 395 U.S. 960 (1969), an importer sought judicial review of the decision of the Secretary of Health, Education and Welfare to restrict his import of certain food under 21 U.S.C. §381(a). The Ninth Circuit held that review was not available as this was a discretionary action of the Secretary, and there was no allegation of arbitrary or capricious action on the part of the Secretary allowing review outside the scope of the Administrative Procedure Act. As the Court stated at page 1190, "While the superficiality of tests and inspections or an arbitrary refusal to accept their results may be appropriate subjects for judicial review, a dispute as to what an examination has established or disclosed is more appropriately left to agency expertise." [See also *Mollohan v. Gray,* 413 F. 2d 349 (9th Cir., 1969)].

there was such a mistake) . . . " this would be harmless error not justifying reversal [377 U.S. at p.248]. The Secretary's actions here fall within that definition. If we assume that the Secretary did err in failing to make written findings, this is not prejudicial. No contention is made that the Secretary failed to approve the route; whether his reasons for approving the route were mentally recorded or committed to paper would not affect the substance of his approval or the procedure employed to make that approval.

In conclusion, it is the State's position that neither the administrative procedure nor judicial review provisions of the Administrative Procedure Act applies to the approval of the Secretary in this instance, that absent the Administrative Procedure Act, no findings were required of the Secretary by the Parklands Statute, and, the Administrative Procedure Act being inapplicable, no findings were required by that Act.[31]

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[31] The Solicitor General, in oral argument and prior brief to this Court regarding the Petitioners' Application for a Stay, stated that the Secretary has now promulgated a regulation under which he will issue findings hereafter in cases such as this. While Respondent considers this irrelevant to the present case, it is merely another example of the Secretary's discretion. If the Secretary has discretion to approve the project, then he certainly has discretion to make or not make written findings regarding any such approval, in individual cases or by general regulation. Since the Secretary did not purport to affect prior approvals by this regulation, it is without application here.

It may be argued on the strength of cases such as *Thorpe v. City of Durham,* 393 U.S. 268 (1969) that the Secretary's regulation, D.O.T. 5610.1, issued October 7, 1970 (almost 10 months after this lawsuit was begun and over a year after admitted approval was given), has retroactive effect here, even though not intended by its terms. Such an argument would have no legal basis, since the *Thorpe* case was intended to apply only where the parties had not changed their respective positions prior to the change in the regulation. In this case, this respondent has changed positions by purchasing the land and the City has spent part of the proceeds. Further, the National Environmental Policy Act which did not take effect until January 1, 1970 (after this case was started) was one of the major reasons for the promulgation of the regulation. A careful reading

ISSUE NUMBER TWO
WAS ERROR COMMITTED BY THE LOWER COURTS' REFUSAL TO ALLOW THE TAKING OF THE DEPOSITION OF LOWELL K. BRIDWELL?

Petitioners, in the District Court, sought to take the deposition of the former Highway Administrator, Lowell K. Bridwell. The Secretary obtained a protective order; Petitioners were thus prohibited from taking said deposition; and Petitioners now claim this to be error.

In discussing this issue, one must first bear in mind that the protective order was issued when the case was before the Court for determination on the Secretary's motion to dismiss, later replaced by his motion for summary judgment, in which the State joined. The Court thus was to determine if there were any material issues of fact to which a deposition would be relevant. As the record developed, Petitioners admitted that the Secretary approved the project and raised only the issue that he did not state in writing the findings upon which that approval was based. The Secretary and the state of Tennessee admitted that the Secretary did not issue these written findings and introduced the affidavits described above, showing the items, information, and matters considered by the Secretary in making his approval of the route.[32] There is no allegation in the complaint claiming anything specific that the Secretary should have considered but did not, nor is there any evidence in the record to support such an allegation. Therefore, no issue of fact exists as to what the Secretary considered. Petitioners now seek to raise an issue of fact, however, as to the weight, effect, and implications of the items considered. Thus, the only question remaining to which a deposition could apply is that of the mental processes of the Secretary or Administrator in relating the information available to him to his approval. No issue exists as to that information or the ap-

[32] Petitioners now claim that they seek to prove by this deposition that Administrator Bridwell did not approve the route at some point, but this is contrary to Petitioners' allegation in their Complaint that the Administrator did, indeed, approve the route.

proval; Petitioners seek to depose Mr. Bridwell as to the mental links between the two. Based on the record before us, the mental processes of this individual are the only subjects a deposition could logically touch on; since these are, by long-standing law, not a proper subject for either discovery or evidence at a trial, the Courts below were correct in respectively issuing and affirming the protective order. The same argument would apply equally as well to the taking of the deposition of the Secretary.

The Court held in *United States* v. *Morgan,* 313 U.S. 409 (1941), that such an inquiry into the mental processes by which an administrative official reached a decision is improper. In that case, the Secretary of Agriculture was called as a witness at the trial of the cause and an issue, not here relevant, was made on appeal to some of his testimony. This Court said, at page 422: "But the short of the business is that the Secretary should never have been subjected to this examination . . . We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 18. Just as a judge cannot be subjected to such scrutiny, . . . so the integrity of the administrative process must be equally respected." Lower courts have followed this decision with much consistency. For example, in *Braniff Airways, Inc.* v. *C.A.B.,* 379 F.2d 453 (D.C. Cir., 1967), the Court, citing *Morgan,* held that "The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize . . . . We cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations." The rule has specifically been held to apply with greater force in a situation where the administrative official is given discretion by Congress to reach his decision [*N.L.R.B.* v. *Sun Drug Co.,* 359 F.2d 408 (3rd Cir., 1966)].

Petitioners devote much attention to *D.C. Federation of*

Civic Assn's, Inc. v. Volpe, ____ F.2d ____ (D.C. Cir. April 6, 1970, No. 23870), *on remand* 316 F.Supp. 754 (D.C.C. 1970), citing the opinion of the District Court on remand [and *D.C. Federation of Civic Assn's, Inc. v. Sirica,* ____ F. 2d ____ (D.C. Cir. May 8, 1970, No. 24216)] as authority for their contention that they are entitled to take the depositions in question here. Actually, this case is not authority for that point, but is readily distinguishable from the instant case. In the *D.C. Federation* case, the plaintiffs had charged that Volpe had approved the particular highway project there in question because of extreme political pressure, such that the approval was a result of personal arbitrary conduct on the part of the Secretary. Discovery was allowed to investigate the merits of this charge. In the instant case, Petitioners have made no such charge; they merely want to go behind the admitted approval to attempt to discover the reasons for it. Thus, in the *D.C. Federation* circumstances, which the Trial Court characterized as "unique," discovery was allowed as to specific charges of misconduct; in the instant case, the only possible subject of discovery is the mental processes of the Administrator or Secretary leading to the approval; this cannot be allowed.

The *D.C. Federation* case is suggestive of one Court's thinking on many other points in controversy here. In the District Court opinion on remand (316 F. Supp. 754), the Court responded to some issues raised by Petitioners in the instant case. For example, the District Court properly interpreted the Parklands Statute as vesting a purely discretionary authority in the Secretary. The Court further held, citing the District Court opinion in the instant case, that the Secretary is not required to make written findings as to the reasons for his approval under the Parklands Statute, since his approval is entitled to the presumption of regularity discussed above. In addition, the District Court in *D.C. Federation* followed substantially the same reasoning as Respondent in arriving at the proper standard of judicial review of the Secretary's approval under the Administrative Procedure Act (assuming that the Act applies). The Plain-

tiffs in the *D.C. Federation case,* in their *amici curiae* brief in the instant case, cite their case as authority on the discovery issue, but attempt to explain away the other holdings of the District Court by showing that they have appealed. *Amici curiae* also do not point out the substantial difference between their case and the one under review here, namely that in their case, they had alleged, based on proper information, that the Secretary arbitrarily based his approval on political pressure. No such charge is present in the instant case.

Since, based on the record in this case, the only subject which a deposition of the Secretary or the former Highway Administrator could explore is their mental processes in approving the route, a subject not proper for discovery under this Court's rulings, the lower Courts were correct in denying such discovery procedure to Petitioners.

ISSUE NUMBER THREE
CAN THIS COURT PROPERLY REVIEW THIS CASE WITHOUT REFERENCE TO THE FULL ADMINISTRATIVE RECORD?

By this issue, Petitioners contend that Federal appellate courts cannot properly determine the other issues in this case without having the full administrative record before them. It is difficult to determine the exact position of the other parties on this issue. The Solicitor General filed a memorandum in opposition to Petitioners' application for a stay, in which he maintained that Petitioners claim that the administrative record was needed was "without merit."[33] Shortly thereafter, the Solicitor General filed a motion to remand, suggesting that this case be remanded to the District Court for the purpose of having the administrative record introduced into evidence. Petitioners, of course, raised this issue in their application for a stay (treated by the Court as a petition for certiorari), but opposed the Solicitor General's motion. By contrast, Respondent Speight has maintained at all times, both in response to the application for a stay and in opposition to the Solicitor General's motion to remand, that there is no basis or need for the entire administrative record to be before the lower courts or this Court.

Petitioners made no effort in the District Court to obtain introduction of the administrative record or any part thereof not part of the record in this case. No affidavit of Petitioners stated that the record was unavailable to them or that they wished any part of it presented to the District Court. Petitioners made no motion in the District Court for production of the administrative record or any part thereof. This issue was first raised by Petitioners in the Court of Appeals. It should be deemed waived by Petitioners at that level for failure to raise it in the District Court.

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[33] See page 10 of this memorandum. At page 7 of this same memorandum, the Solicitor General agrees, at least in part, to this Respondent's contentions concerning the inapplicability of the Administrative Procedure Act.

Moreover, the record is clear that the entire administrative record was made available to counsel for Petitioners, who could have examined it and introduced whatever part he deemed beneficial to his clients' cause. In fact, the affidavit of Petitioners' counsel [App., p. 61] shows that documents and letters which he filed in the cause were provided to him by the Bureau of Public Roads. While some controversy developed between Petitioners' counsel and the Solicitor General as to the availability of the administrative record to Petitioners, it is easily concluded from the record that Petitioners did have the opportunity to examine the administrative record and did, in fact, insert some items therefrom in the record in the District Court.[34] Having had this opportunity to examine and introduce the administrative record themselves, Petitioners should be estopped to complain that Respondents failed to introduce it.

In considering this question, we must ask what is the "administrative record"? This is open to some speculation, since neither Petitioners in their arguments below or to this Court on application for a stay, nor the Solicitor General in his motion to remand, has suggested to this Court what might be in the administrative record which could be relevant to the issues before the Court. The affidavits introduced,[35]

[34] See the attachments to Mr. Vardeman's affidavit concerning one of the studies made of one of the alternate routes. If, as Petitioners contend, the Administrative Procedure Act is applicable to the Secretary's approval, Petitioners were further entitled to examine the administrative record under 5 U.S.C. §552.

[35] Petitioners argue that Respondents' affidavits contained in the record are somehow defective because obtained for the purpose of this litigation. While, of course, that was the purpose of making these affidavits (what other purpose for making such affidavits could there be?), this does not in any way affect the validity of the affidavits or truth of the statements therein. By contrast to the affidavits introduced by Petitioners, all given by persons whose interest in this highway project is limited to this lawsuit or who were hired to testify in this case, all of Respondents' affidavits are from persons working on the project long before the lawsuit was hatched or having no direct participation in the project at all.

particularly the Swick affidavit [App., p. 27], show that the Secretary considered many plans for alternative routes, engineering studies, social impact studies, and a host of other relevant data in reaching his approval of the project. One can certainly assume that these items are in the administrative record, but these items would not be relevant to any issue before the Court. These could be relevant only on the question of the wisdom of the Secretary's approval of the route, which is not, and cannot properly be, an issue here, or to a claim that the Secretary arbitrarily ignored these items in reaching his approval, but no such claim has been made by Petitioners.

Perhaps what we know is *not* in the administrative record is more instructive to the question of the propriety of its introduction than what we can guess might be in it. The principal issue in this case is whether the Secretary was required to evidence his admitted approval of the project with written findings. All parties admit that the Secretary made no written findings as such, so that none would be found in the administrative record. All parties have admitted that the Secretary did approve the route and design of the highway, and that in so doing, required certain changes, which the State accepted. Thus, one would expect nothing to appear in the administrative record which enlarges on this approval. Since it is admitted that the administrative record contains nothing beyond what is already introduced which is relevant to the issues to be decided, what conceivable purpose (other than delay) could an introduction of the entire administrative record serve?

There is nothing in either the Federal-Aid Highway Act or the Department of Transportation Act which even suggests that the administrative record should be before this Court. In fact, the purely discretionary nature of the Secretary's approval suggests the contrary, absent a contention that the Secretary failed to exercise his discretion or arbitrarily ignored the policy guidelines in those statutes [see discussion under Issue Number One above]. Therefore, if the administrative record is required to be presented to the

Court, it can only be under the Administrative Procedure Act.

Respondent has strongly suggested to the Court that the Administrative Procedure Act has no application to this case, either in determining intra-agency procedure or judicial review. This discussion will not be repeated here. However, even should we assume (without admitting) that the judicial review provisions of the Administrative Procedure Act were applicable here, the necessity for introduction of the entire administrative record would be required only under §706 thereof [5 U.S.C. §706].

Petitioners have claimed that the admission of the administrative record is required by 5 U.S.C. §706, and this contention seems to be the basis for their entire argument on this point. In advancing this point in their brief and in their application for a stay, Petitioners quote §706, only in part, to read "the Court shall review the whole record . . . .," replacing the following phrase with dots of omission—this phrase is "or those parts of it cited by a party . . . . " This part of §706 reads in its entirety:

> "the court shall review the whole record or *those parts of it cited by a party,* and due account shall be taken of the rule of prejudicial error." [emphasis supplied]

Petitioners have thus covered up a large point with four small specks.

Section 706 of 5 U.S.C., read in its entirety, makes it clear that Congress did not intend that an administrative action be reviewable only if the Court has before it the whole administrative record. It has been held under this section that the requirements thereof are met when the Court has before it those parts of the administrative record which the parties choose to present, and that if a party fails to present to the Court some part of the administrative record he deems relevant or material, he cannot later complain of its absence [see *Bartusch* v. *Washington Metropolitan Area Transit Commission,* 344 F.2d 201 (D.C. Cir., 1950)].

Petitioners contend that the administrative record is nec-

essary to determine if the Secretary's approval was sufficient to comply with the Parklands Statute. This argument begs the question. Since everything the Secretary did in approving the project is admitted, there is no light the administrative record can shed on this issue if, indeed, a valid issue it be. Petitioners also contend that the administrative record is necessary to enable this Court to determine if the Secretary's approval was arbitrary or unsupported by substantial evidence (claims not raised in the complaint). This is a circular argument, going something like this: (1) the Administrative Procedure Act applies; (2) therefore, we look at the Secretary's approval to see if it is arbitrary; (3) to do this, we need the whole administrative record; (4) the production of the whole administrative record is required by the Administrative Procedure Act; (5) therefore, the Administrative Procedure Act applies. The gate out of this maze is the nonapplication of the Administrative Procedure Act, shown regarding Issue Number One above.

The fact is that Petitioners did not allege in their complaint or argue in the District Court on the motion for summary judgment under Rule 56,[36] Federal Rules of Civil Procedure, that any action of the Secretary was arbitrary or unsupported by substantial evidence. Even if this Court were to accept this new argument here, we should note that there is no evidence in the record or allegation in the complaint to substantiate it; it is based solely on Petitioners' statements to appellate courts. As this Court stated in *Schilling v. Rogers, supra:* "However, such conclusory allegations [of arbitrary and capricious action by an administrator] may not be read in isolation from the complaint's factual allegations . . . . " [see also *Braniff Airways, Inc.* v. *C.A.B., supra; Willapoint Oysters, Inc.* v. *Ewing,* 174 F.2d 676 (9th Cir., 1949), *Cert. Den'd,* 388 U.S. 860 (1949), where this point as well as the presumption of administrative regularity, is discussed.

[36] This rule also suggests the use of affidavits as the proper means of submitting evidence to the Court.

Petitioners, in Footnote No. 19 to their brief on the merits, admit that Respondent's contention that they have not raised any issue of arbitrariness by their complaint or otherwise is correct. They then cite a part of Rule 15(b) of the Federal Rules of Civil Procedure in an attempt to save the issue. This Rule, however, does not pertain to issues of law determined under Rule 56, but deals entirely with trials on the merits and the amendment of pleadings to conform to evidence properly admitted at such a trial. Petitioners apparently contend that this issue, raised only in conclusory statements of counsel, is saved by Respondents' express or implied consent derived somehow from this Respondent's argument that there is no such issue. Under Petitioner's reasoning, the only way Respondent could have avoided this issue would have been to ignore it.

Petitioners seem to argue that whether or not this Court should hold that written findings are required, what the Secretary did was arbitrary, and the Court must look at the administrative record to weigh the degree of arbitrariness. This argument overlooks the long-standing rules regarding the presumption that the action of the Secretary is correct and regular, absent sufficient allegations to the contrary [see *O'Dwyer* v. *Commissioner of Internal Revenue,* 266 F.2d 575 (4th Cir., 1959)]. The Court of Appeals answered Petitioners' contentions in this regard at page 4 of its opinion, which answer Respondent adopts:

> "It [the presumption of regularity] also makes it clear that a party opposing a summary judgment must do more than merely assert that the Administrative actions were unlawful. He must be able to show by affidavit, or other evidence, that there is at least a possibility that he will be able to overcome the presumption of regularity."

Therefore, Respondent contends, as he did in opposition to the Solicitor General's motion to remand, that there is

no basis, either in statutory law or in terms of relevance to the issues in this case, upon which a Court reviewing the Secretary's approval of the highway project must have before it the entire administrative record.

ISSUE NUMBER FOUR
MUST THE PETITIONERS SHOW THAT THE SECRETARY'S APPROVAL WAS ARBITRARY OR CAPRICIOUS IN ORDER TO OBTAIN RELIEF?

In this issue, as stated in their application for a stay, Petitioners raise the question of which standard provided for judicial review in the Administrative Procedure Act, the "arbitrary and capricious" standard [5 U.S.C. §706(2)(A)] or the "unsupported by substantial evidence" standard [5 U.S.C. §706(2)(E)] applies to a judicial review under the Administrative Procedure Act of the Secretary's approval of the highway project in question. Of necessity, this issue presupposes that the judicial review provisions of the Administrative Procedure Act have application to this case. Because of the exclusion in 5 U.S.C. §701 of judicial review of discretionary actions, Respondent contends that the Administrative Procedure Act has no application herein as a basis for judicial review; therefore the question posed by Petitioners in this issue becomes moot.

However, even assuming that the judicial review provisions of the Administrative Procedure Act did apply here, Petitioners are incorrect in their conclusion that the "substantial evidence" standard applies. Section 706(2), 5U.S.C. states in relevant part:

> "The Reviewing court shall— . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . . "

The "substantial evidence" test applies only to those cases subject to §§556 and 557 of the Act, which sections prescribe certain procedures for agency hearings, or cases otherwise

reviewed on the record of an agency hearing. A statutory prerequisite for the application of this standard is that there be a review of the record of an agency hearing. As shown above, neither the Federal-Aid Highway Act, the Department of Transportation Act, nor the Administrative Procedure Act requires an agency hearing prior to the Secretary's approving a highway project. The only hearing provided for is a *state* informational hearing [23 U.S.C. §128], not an *agency* hearing of any kind. Thus, by the terms of the statute, if any enumerated standard applies here, it must be the "arbitrary and capricious" standard.

Petitioners rely on the dissent of Judge Celebrezze in the Court of Appeals to substantiate their claims in this regard. While most of the reasons given by Judge Celebrezze have already been answered, it is important respectfully to note certain major defects in his opinion. Judge Celebrezze seems to doubt either the skill or the motives of the Secretary in giving his approval of the route, and appears desirous of substituting the abilities of the Court for those of the Secretary in making the route selection. However, this Court has long held that it will not allow its judgment to be substituted for that of an executive in determining the wisdom of the location or other such details of a public project [see *Berman* v. *Parker,* 348 U.S. 26 (1954)].[37] It has been held

[37] *Berman v. Parker,* and the multitude of cases holding that Courts will not replace the discretion of the executive with their own in regard to the placement and construction of public projects, does not either hold or imply that this Court cannot construe the Parklands Statute, or, in so doing, determine (upon proper allegations and proof) if the Secretary's approval conformed to the policy standards in that statute. The Parklands Statute does not alter the effect of *Berman v. Parker* at all; looking at the two together, the law still is that a Court will not, under the Parklands Statute, apply its wisdom over the wisdom of the Secretary to determine if alternate routes are "feasible or prudent," or if alternate designs are "possible." All a Court should do under the *Berman* holding, in applying the Parklands Statute, is determine if the Secretary himself made these decisions in good faith. Petitioners, and apparently Judge Celebrezze, would have this Court determine what routes are feasible or prudent, thus violating the rule in *Berman.*

that such substitution of judgment is improper, even on cases decided under the Administrative Procedure Act [*Udall* v. *Washington, Virginia & Maryland Coach Co., et al.*, 398 F.2d 765 (D.C. Cir., 1968); *Willapoint Oysters Co.* v. *Ewing, supra; Braniff Airways, Inc.* v. *C.A.B., supra*]. Judge Celebrezze suggests that if courts review decisions of the N.L.R.B. and municipal traffic courts in this manner, why not those of the Secretary? However, the cases show that courts are equally hesitant to substitute their judgment for that of the N.L.R.B. in analogous situations [*N.L.R.B* v. *Sun Drug Co., supra; Singer Sewing Machine Co.* v. *N.L.R.B.*, 329 F.2d 200 (4th Cir., 1964)]; Respondent is certain the same rules apply to municipal traffic courts.

Since Petitioners have not alleged any facts which would bring into play either standard specified in 5 U.S.C. §706, the question again appears moot. However, assuming that such necessary allegations were present and the Administrative Procedure Act did apply, Respondent contends that the "arbitrary and capricious" standard is the proper one.

Petitioners assert, for the first time in their brief on the merits, that if the standard in 5 U.S.C. §706(2) (E) does not apply because no hearing is required by statute (as Respondent contends), then the "unwarranted by the facts" standard indicated in 5 U.S.C. §706(2) (F) applies, requiring a trial *de novo*. This argument, of course, assumes that Chapter 7 of the Administrative Procedure Act applies, which Respondent contends is not the case, because the Secretary's approval is committed by law to his discretion. However, again assuming that this chapter does apply, the "unwarranted by the facts" standard has no application. First, this standard applies only " . . . to the extent that the facts are subject to trial de novo by the reviewing court" [5 U.S.C. §706(2) (F)]. Unlike the "arbitrary and capricious" standard contained in Subsection A, this standard presupposes a review of the administrative action on the merits; in this case, that would mean a reveiw of the wisdom of the Secretary's approval of the highway route and design. Such a review has long been precluded by this Court

[see *Berman* v. *Parker, supra*], and nothing in the Administrative Procedure Act changes this rule of law. Second, Petitioners have alleged no facts which would lead to an inference that the Secretary's approval was unwarranted by the facts and, therefore, summary judgment was proper. In order to have a trial *de novo* in any situation and avoid summary judgment, the Petitioners would have to allege facts showing the required dispute; this they have failed to do. Third, a party is entitled to a trial *de novo* (such entitlement being the statutory prerequisite to the application of this standard) only in situations where a "trial" or hearing was, or should have been, held in the first instance. The legislative history cited by Petitioners at page 35 of their typed brief [*Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong. 2d Sess. 39 (1944-46)] shows that Congress intended Subsections E and F to be correlative; this can only mean that Subsection E applies where a hearing is required within the agency by statute, and Subsection F applies where the particular statute does not require a hearing, but the type of agency action is one which would otherwise be subject to a hearing. Any other interpretation would lead to the conclusion that every agency action is subject to a trial *de novo*, from the decision of the President to activate the National Guard [the President not being within the exclusions in 5 U.S.C. §701(b)] to a determination that a certain crop of cranberries is contaminated.

Discretionery actions of executives, not subject to a hearing by statute or otherwise, are excluded from review by trial *de novo*. This is shown by the case cited by Petitioners, *First National Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965). In that case, the Court first decided that no hearing was required by statute on the question of the establishment of a branch bank, there contested by a competitor of the applicant. The Court next determined that the comptroller's approval was not a discretionary action within the exclusion in 5 U.S.C. §701 and, therefore, was subject to judicial review under §706. There being no hearing required, the

standard for review was found to be under Subsection F regarding a trial *de novo*. However, there are some important points about this case which distinguish it from the instant case. First, the *Bank* case involved a statute giving the comptroller a very different type of discretion, amounting almost to a ministerial duty. If he found that the applicant conformed to statutory requirements, he then had to issue the approval, while in the instant case the Secretary is called upon to use his discretion to determine if routes are "feasible" and "prudent" or designs are "possible." The comptroller was not to determine such widely discretionary factors — only if the proposal conformed to explicit state law. This indicates that Chapter 7 would not apply at all to the Secretary's approval here. Second, while no hearing was required by statute in the *Bank* case, it was a type of action normally taken after a hearing. The distinction is that a hearing is normal to administrative actions taken to determine the rights and liabilities of individuals in the private sector of society, and if no such hearing is statutorily required, then the facts needed to review judicially such a decision are supplied on trial *de novo*. [See Vol. 4 Davis, *Administrative Law Treatise*, §29.07 (1958), where Professor Davis states that the usual example of where a trial *de novo* is had is a review of a tax determination by the Internal Revenue Service.] On the other hand, where the administrative action is one concerning the plans and programs of government itself, no hearing is proper [see *Pacific States Box & Basket Co.* v. *White, supra*, at p. 186]. Finally, in the *Bank* case, the Court held that if, after the trial *de novo*, the trial court found "that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion" [352 F.2d at p. 272]. Thus, the *Bank* case held, in the final analysis, that the only purpose of a trial *de novo* is to supply to the Court facts which would have been supplied by an

agency hearing, had one been held. Having those facts before it, the Court then decides the legality of the administrator's action on the "arbitrary and capricious" standard. Since in the present case the approval of the Secretary was a purely discretionary one, involving an action of government itself not subject to an agency hearing by statute or otherwise, 5 U.S.C. §706(2) (F) has no application. Not only is the Secretary's approval not the type of agency action where a hearing should be held, but the Petitioners have alleged no facts which indicate that anything necessary to a decision by this Court is missing from this record.

If Respondent is correct that the judicial review provisions of the Administrative Procedure Act do not apply to this case, judicial review upon proper basis is still available to Petitioners, in which case the question raised in this issue is relevant. For a judicial review of the discretionary approval of the Secretary of this highway project, there must be a charge, if not some factual allegation substantiating that charge, that the Secretary arbitrarily ignored the policy guidelines in the Parklands Statute, that he failed or refused to exercise his discretion, or that he acted beyond the scope of his powers [see *Schilling* v. *Rogers, supra*]. In such case, the Petitioners must indeed show that the Secretary was arbitrary in the manner of making his approval. Petitioners have not shown this; and thus, judicial review is not available to Petitioners in this instance, not because the law precludes it, but because Petitioners have failed to allege or prove the necessary basis to obtain the judicial review which the law does provide.

In conclusion, Respondent contends that under the Administrative Procedure Act, or otherwise, Petitioners must indeed show that the Secretary was arbitrary and capricious in order to obtain the relief sought.

ISSUE NUMBER FIVE

DOES THE RECORD CONTAIN DISPUTED ISSUES AS TO RELEVANT MATERIAL FACTS, SUCH THAT SUMMARY JUDGMENT IS NOT APPROPRIATE?

The District Court granted, and the Court of Appeals affirmed, Respondents' motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Petitioners raise the issue in this Court, as they did in the courts below, that the granting of summary judgment was not proper because there exist in the record disputed issues as to facts relevant and material to the questions before the Court. Respondent agrees with the following statement from the Court of Appeals' opinion, page 3, as to the law governing the determination of summary judgment in this case:

> "When considering a motion for summary judgment a court is required to 'construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers suporting the movant are closely scrutinized, whereas the opponent's are indulgently treated.' *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d 425, 427 (6th Cir., 1962). If, after having done that, the court is able to say there is no genuine issue as to any material fact, summary judgment is appropriate.
>
> "Although a court must be hesitant to grant summary judgment, cases challenging administrative action are ripe for summary judgment. See, *e.g.*, *Todaro* v. *Pederson*, 205 F.Supp. 612, 613 (N.D. Ohio 1961), *affm'd* 305 F.2d 377 (6th Cir.), *cert. denied* 371 U.S. 891 (1962)."

Therefore, the only question regarding this issue is whether, in fact, such disputed issues exist. Respondent contends that there are no such disputed issues of material facts, and that summary judgment was proper.

It is somewhat unclear just what Petitioners contend to be the disputed items of fact. It seems well settled that the sole determinative issue remaining in this case (other than

the question of Petitioners' taking Bridwell's deposition, which is purely a legal question) is the only issue raised by Petitioners' complaint: was the Secretary's approval of the highway project sufficient to satisfy the requirements of the Parklands Statute without his issuing written findings as to the reasons and bases for that approval? Any so-called disputed issue of fact which could avoid summary judgment in this case must relate to this question, but no such factual issue exists, as all facts relative to this question are admitted. As shown above, Petitioners have admitted in their complaint and otherwise that the Secretary did, in fact, approve the route and design of the highway, and even admit that he conditioned his approval on certain changes in design intended to minimize harm to the Park. Respondents have admitted that in approving the highway, the Secretary issued no written findings of the type sought by Petitioners. Therefore, these being all of the facts relevant to this question, there exists no disputed issue of facts material to the prime question in the case.

Petitioners claim that some disputed issue of fact surrounds their claim that the Secretary was arbitrary, a claim not advanced in the pleadings. First, it appears that Petitioners claim that the admitted failure of the Secretary to issue findings was, itself, arbitrary. If this is the basis of Petitioners' argument about arbitrary action of the Secretary, it affords no grounds for a disputed issue of fact. If this Court holds, as Respondent contends, that no such findings are required by the Secretary, then his failure to issue written findings cannot be deemed arbitrary. If this Court holds that such findings are required, then that is sufficient grounds for relief (unless deemed harmless error), without determining if that failure was arbitrary. In any event, to be material, Petitioners' contention should be that the failure to issue findings was arbitrary, whatever the reason for the failure. However, Petitioners nowhere allege any facts, disputed or otherwise, which show any reason, arbitrary or otherwise, for the Secretary's failure to issue findings.

Aside from the failure to issue findings, Petitioners now contend that the approval of the project itself was arbitrary, although all we have in the record is this naked contention unclothed with substantiating facts. Petitioners further contend that the affidavit of Arlo I. Smith [App., p. 13], purporting to dispute the Swick affidavit [App., p. 27],[38] raises disputed issues of fact; but a review of the Smith affidavit shows this not to be the case. Mr. Smith first complains of certain procedural defects in the State informational hearings; these defects were found to be harmless by the lower courts, and this charge is not raised in this Court. Mr. Smith then states that the Secretary did not issue findings (which is admitted), and that, in Smith's opinion, there exist other feasible and prudent alternative routes. Mr. Smith does not claim that the Secretary failed to consider all alternative routes to see if any were feasible or prudent, or that the Secretary chose the route selected for an arbitrary reason, *e.g.*, that a relative owned land on that route. The blanket assertion by Mr. Smith or anyone else that, in his opinion, another route might be feasible and prudent is immaterial to any proper issue in this case. The question to be decided by this Court is not what route is the most, or only, feasible and prudent one, but whether the Secretary properly considered alternative routes in giving his approval to the route selected. Mr. Smith's affidavit is irrelevant to this issue and, therefore, raises no disputed issue of fact. The affidavit of Mr. Robert Conradt [App., p. 92], an engineer retained by Petitioners for this lawsuit, contains the same defects as the Smith affidavit, thereby raising no disputed issue of fact.

[38] Petitioners have claimed error because certain attachments to the Swick affidavit [App. p. 33] were not certified or authenticated. Petitioners made no timely objection in the District Court to the consideration of these documents by the Court, nor have Petitioners ever claimed that these documents are not true copies of what they purport to be. In fact, the Smith affidavit [App. p. 13] confirms the authenticity of these documents. The Court of Appeals quite effectively answered this contention of Petitioners at pages 6 and 7 of its opinion, and this appears no longer to be a question before this Court.

Petitioners emphasize Conradt's statement that, in his opinion, the fact that most of the right-of-way on either side of, and up to, the Park had been acquired and cleared, would not affect the selection of an alternate route. This does not raise a disputed issue of *fact;* it only shows that Conradt was of a different *opinion* than the Secretary on this point. Since the major part of this right-of-way was acquired before Parklands Statute was effective — that is, before the law required the approval here in dispute — there can be no question that it was proper and necessary for the Secretary to consider the state of right-of-way acquisition on the date of his approval. This is a very different case than *Citizens Committee for the Hudson Valley* v. *Volpe,* 302 F.Supp. 1083 (S.D.N.Y., 1969); *aff'd* 425 F.2d 97 (2d Cir., 1970); *Cert. Denied,* ____ U.S. ____ (Dec. 7, 1970). In the *Hudson Valley* case, the Corps of Engineers was planning to fill in the disputed segment of the Hudson River (thereby effectively placing the highway on the fill) without giving the Secretary of Transportation a chance to give or withhold any approval of the route.

Petitioners make much of the contention that Highway Administrator Bridwell[39] testified before a Congressional subcommittee [App., p. 65] that alternative routes existed at that time. This raises no material issue of fact, however. The Secretary has never contended that the route through the Park was the only route; he contends that when he approved this route, it was his decision that no other feasible and prudent routes existed. Congress delegated to the Secretary, and the Secretary alone, the discretion to make that determination. Petitioners' contentions that, at some time or times, someone said that alternative routes existed, or someone has an opinion that an alternative route is feasible or prudent, are irrelevant to the issue before the Court. To be so relevant, Petitioners must show by properly documented facts that the Secretary (not Mr. Smith or someone not in the decision-making position) believed that a

[39] Petitioners admit, through the Smith affidavit [App. p. 13], that Bridwell approved the present route on April 10, 1968.

feasible and prudent alternative existed, but that he, in giving his approval, arbitrarily disregarded that alternative. No such showing has been made by Petitioners and, therefore, there is no disputed issue on this point.

Petitioners next contend that a dispute exists as to the date of the Secretary's approval of the project. However, Petitioners alleged in their complaint that the project was finally approved in November 1969, and Respondents have agreed with this. In any event, even if such a dispute did exist, it would be relevant only if the Secretary relied on a defense that his approval predated the Parklands Statute. To this Respondent's knowledge, the Secretary has never taken such position, but has chosen to face head-on his responsibilities under the Parklands Statute.[40]

Therefore, there exists no disputed issue of fact in any form relating to the approval by the Secretary of the highway route and design or the Secretary's manner of granting that approval. Boiled down to essentials, the only disputed issues of fact relate to the question of what is the best route and design for the highway. Petitioners disagree only with the wisdom of the Secretary's approval, saying that they would have chosen another route or selected a different design. This is undoubtedly caused by the special interests of the Petitioners in conservation — interests which are to be commended and which the Secretary certainly considered heavily—but interests which Petitioners give greater weight on the scales of decision than the Secretary is permitted to do. Unlike Petitioners, who are allowed, and even encouraged, by our social and political system, to advance only their own favorite interests (as they have done with praiseworthy skill and sincerity), the Secretary is charged by policy dictates of Congress and responsibilities of his position to

[40] The record shows that this route was approved before the effective date of the Parklands Statute, but that this approval was reviewed and reaffirmed after the Parklands Statute was passed. The final approval required certain changes in the design to minimize harm to the Park, not included in prior approvals [see Edgar W. Swick Affidavit, (App. pp. 7, 37)].

consider not only the interests of Petitioners, which he must surely share, but also the interests of efficient transportation, highway safety, pollution control, and a host of other equally important national concerns. Because he has the skill and facilities to study and balance these interests, Congress delegated to the Secretary the discretion to approve highway routes and designs. Petitioners would have this Court remove this discretion from the Secretary and place it in the Court itself, so that this Court would be placed in the position of selecting the route for the highway and planning its design. This is something that this Court has never done nor, Respondent thinks, should ever do [see *Berman* v. *Parker, supra*].

Since the only disputed issue of fact (in reality, a disputed decision of opinion, not fact) — the wisdom of the Secretary's decision — relates to an issue not properly before this Court, there exists no disputed issue as to material facts which would render summary judgment inappropriate. For these reasons, Respondent contends that the courts below properly granted and affirmed summary judgment for Respondents.

VII. CONCLUSION

Respondent, the Highway Commissioner of Tennessee, respectfully submits to the Court that the District Court and Court of appeals properly granted and affirmed summary judgment in favor of Respondents in this case. Therefore, Respondent prays that this Court affirm the decision of the Court of Appeals and dissolve the stay heretofore ordered in the case.

Respectfully submitted,
J. ALAN HANOVER
JAMES B. JALENAK

JANUARY 4, 1971